When should unconstitutionality mean 'void ab initio'?

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Introduction: *Cheatle v The Queen*

The purpose of this article is to highlight the dilemmas unconstitutionality can create, and to give some insight into a theoretical solution which can be applied practically to solve those problems. A vehicle through which to communicate these ideas is the recent High Court decision of *Cheatle v The Queen*.[1] In this case, Harvey and Beryl Cheatle were convicted of the offence of conspiracy to defraud the Commonwealth[2] in accordance with a majority jury verdict. This verdict had apparently been lawfully delivered pursuant to s 57 of the *Juries Act* 1927 (SA) and s 68 of the *Judiciary Act* 1903 (Cth). Section 57 provided that if, after four hours deliberation, a jury had not reached a unanimous verdict, then in cases other than murder or treason, a majority verdict shall be returned. A majority verdict was defined to mean a verdict in which ten or eleven jurors concur: s 57 (4). The Cheatles no doubt felt the utilitarian overtone of the majority verdict, while expedient, was a grave infringement upon their human right to trial by jury and proceeded to challenge the validity of the legislation authorising the majority verdict, in the High Court.

Section 80 of the Commonwealth *Constitution* provides, amongst other things, that "the trial on indictment of any offence against any law of the Commonwealth shall be by jury". The High Court in *Cheatle v The Queen*,[3] an unanimous judgment of the Court, held that "section 80's guarantee of trial by jury precludes a verdict of guilty being returned in a trial upon indictment of an offence against a law of the Commonwealth otherwise than by agreement or consensus of all the jurors".[4] As a consequence, it was pronounced that s 57 of the South Australian *Juries Act* 1927 was unconstitutional insofar as it purported to apply the concept of majority jury verdict to trials on indictment of offences against a law of the Commonwealth. The Court relied upon the common law prevailing in 1900, the principles underlying the requirement of unanimity of jurors

[1] (1993) 67 ALJR 760, (1993) 177 CLR 541.

[2] An indictable offence pursuant to s 86A, *Crimes Act* 1914 (Cth).

[3] *Supra, n* 1.

[4] *Ibid,* at 769 or 562.

and the weight of judicial authority, in reaching their conclusion.

The interesting point for this analysis is that the High Court decided that majority verdicts in trials on indictment for offences against laws of the Commonwealth were unconstitutional. Does this unconstitutionality have retrospective effect? Must we now release anyone unconstitutionally convicted?

Unconstitutionality and retroactivity

The traditional view inspired by the declaratory theory of adjudication sought to make unconstitutional statutes *void ab initio.*[5] With the questioning of the declaratory theory of adjudication and the rise of interpretive theories that judges make law, the *void ab initio* approach started to wane. The best example of this is found in the jurisprudence of the United States Supreme Court, where the *void ab initio* doctrine came to be replaced by an interpretive inspired prospective over-ruling approach.[6] Is it correct to suggest, though, that a rejection of the declaratory theory of adjudication makes all judicial law-making (original or over-ruling) prospective?

The interpretive explanation of judicial law-making, along with the prospective over-ruling device, have made it easier for courts (primarily in the USA) to avoid the massive inconveniences unconstitutionality can produce. A satisfactory theoretical underpinning has, however, been missing from this new enterprise. The problem arises from the fact that, just because judges make law through interpretation, does not mean their interpretations are never retrospective. If they are retrospective in some instances, then why not in all instances? For example, the High Court in *Cheatle* appears to suggest its interpretation (or making of law) is retrospective to 1901. The Justices say:

> *It follows from what has been said that history, principle and authority combine to compel the conclusion that s. 80's guarantee of trial by jury precludes a verdict of guilty being returned in a trial upon indictment of an offence against a law of the Commonwealth otherwise than by agreement or consensus of all the jurors. That being so s. 57 of the* Juries Act *1927 (SA) cannot, consistently with s. 80, operate to* **authorise** *the conviction of either of the appellants by a majority verdict*[7] *(emphasis added).*

It could be argued that judge-made law is only party specific and that the *Cheatle* decision only has effect between the litigating parties. This narrow view ignores the fact that the *Cheatle* decision will be relied upon by governments and people as governing analogous situations. The point is that the demise of the declaratory theory of judging and the rise of the interpretive theory that judges make law, does not provide the final solution to unconstitutionality as judicial law-making acts, to some degree, retrospectively as well as prospectively. The key issue, then, is what justifies the prospective operation of judicial law-making in constitutional cases? In the USA, the newness or unpredictability of the judicial decision is seen to be the threshold condition for prospective operation.[8]

As has been said, the main device used in the United States to overcome the effects of unconstitutionality has been prospective over-ruling. The doctrine of prospective over-ruling applies in situations

[5] Pannam, C, "Recovery of Unconstitutional Taxes in Australia and the United States", (1964) 42 *Texas LR*, 777 at 798-779; McHugh JA (as he then was) in *Peters v A-G (NSW)* (1988) 84 ALR 319 at 331-333; (1988) 16 NSWLR 24 at 38-9.

[6] Tribe, L, *American Constitutional Law* Foundation Press, 1988, 27-32; Pannam C., "Unconstitutional Statutes and De Facto Officers" (1966) 2 *Federal LR*, 37 at 65 ff.; Mason K, "Prospective Overruling", (1989) 63 *ALJ* 526; Treanor W, and Sperling G, "Prospective Overruling and the Revival of Unconstitutional Statutes", (1993) 93 *Columbia LR*, 1902. The latter article deals with the reverse question of whether a judicial determination of constitutionality is retrospective in a situation where a statute has been determined previously to be unconstitutional.

[7] *Supra, n* 1, at 769 or 562.

[8] Fallon, R, and Meltzer, D, "New Law, Non Retroactivity, and Constitutional Remedies", (1991) 104 *Harvard LR*, 1731 at 1758 ff.

where there is a constitutional precedent/case to over-rule. In the USA this is more often the case than in Australia and, thus, it might be said that prospective over-ruling is a notion that has little practical application in Australia. Such an attitude fails to appreciate that, behind the notion of prospective over-ruling, lies a general principle of prospective unconstitutionality generated by the newness or unpredictability of the judicial decision. Admittedly, in cases of over-ruling, reliance upon a previous decision is a major issue yet, at bottom, prospective over-ruling is all about prospective unconstitutionality; a notion that works in over-ruling or original decision-making situations. The prospective unconstitutionality, so long as it does not take away fundamental constitutional rights, is justified by the unpredictability or inconvenience of the judicial decision, which no doubt will be more likely to occur in over-ruling situations, but yet not impossible in original or first up adjudication.

In the USA, prospective over-ruling is seen as a remedial device through which judges can exercise a discretion as to whether to make unconstitutionality (or at least, its effect) retrospective.[9] The judges look at a variety of considerations such as the 'newness' and purpose of the new rule, and the effect of retroactivity upon the administration of justice.[10] Prospective over-ruling provides the seeds to a solution but, as it stands, is theoretically underdeveloped. Why is newness or unpredictability such an important ingredient to prospective unconstitutionality? Newness or unpredictability are important because they indicate a break with the past, with assumptions. If the judicial norm is something so very new and unpredictable, then its applicability may only be suitable from now on. But is newness the only concern?

As the USA Supreme Court has found, the threshold question of newness of the norm must be considered in the context of whether it evidences an enduring constitutional value. This causes an immediate problem or paradox. If it is possible to say that an unpredictable interpretation creates a norm that has endured as a fundamental constitutional principle prior to the decision, then there is clearly a contradiction. For if the judicial pronouncement is unpredictable, is it not difficult, nigh impossible, to say the decision represents an enduring value of the people which has existed from time immemorial? One way of solving this problem is to say a judicial decision of the modern day may seek to impose its morality on years gone by, believing that to tolerate older practices is unacceptable.[11] Adopting such a solution, one is then drawn into the issue of what are the situations that will demand retrospective admonishment and constitutional prohibition? At a general level it could be said that, at one extreme, there is unconstitutionality that will unacceptably threaten life or liberty (timeless fundamental values) immediately if not made retrospective (criminal cases). At the other end of the spectrum, there is grudgingly acceptable unconstitutionality that will apparently cause economic disadvantage if not made retrospective (the unconstitutional tax cases). In the tax cases an argument is more easily made that unconstitutionality should be operative prospectively because such operation will not act to kill or imprison anyone. Such an argument would be based upon the fact that economic wealth is borne out of society and, in return, society demands that some wealth be

[9] Tribe, L, *supra, n* 7, at 30; Fallon R, and Meltzer D, *supra, n* 8. Fallon and Meltzer, in an interesting article, put forward the argument that prospective over-ruling is a remedial device used to prevent plaintiffs being awarded a remedy for unconstitutional action. The article lacks clear expression of a theoretical basis for non-retroactivity: see Fitzgerald B., *infra, n* 14, at 33-4.

[10] Mason, K, *supra, n* 7, at 527-528; Fallon R, and Meltzer D, *supra, n* 8.

[11] In predictable situations the retrospective effect of the unconstitutionality starts at latest from the point where historical conditions permit the inference of predictability. For example, in *Cheatle* the High Court seems to suggest predictability of the decision existed from 1901 or earlier and therefore gave the unconstitutionality effect from that point. Thus in unpredictable situations the key for retrospectivity is the type of value the decision is trying to impose and whether it should be imposed on unenlightened forebears while in predictable situations the key to retrospectivity is working out when the predictability arose.

returned to keep it going.

In summary, prospective unconstitutionality presumes that government action prior to the decision is acceptable. What defines acceptability is a difficult issue, yet one that must be embraced and one the USA Supreme Court has touched upon only vaguely.[12] In this regard, an approach that focuses upon the justification for legitimating government action that is performed prior to the decision is the key to a convincing prospective unconstitutionality approach.

Legitimate authority and reliance

An approach elaborated by the author elsewhere[13] gives primacy to the notions of legitimate authority of the legislature and the reliance of people upon the co-operation fostered by the exercise of authority.[14] In short, if the government upholds the aspirations of the community and its values, yet acts unconstitutionally, the solution must lie in a determination of whether formal invalidity should defeat what is, in substance, a desirable and utilised action. The approach advocated, which privileges substance over form, calls for judges to adopt a common law principle prescribing:

An unconstitutional statute is of no effect unless it can be proved that:

- **a) the government (public power holder) had a morally justified claim to exercise authority over the people;[15]**
- **b) people (including the plaintiff) relied upon the benefits of social co-ordination fostered by the unconstitutional statute; and**
- **c) that damage to the future practice of social cooperation is inevitable if the statute is not given effect,**

whereupon the statute must be given effect to the point of curial review or a reasonable time thereafter.

This approach moves towards a theoretical foundation for legitimating unconstitutional legislative action.[16] It is suggested that the approach, in determining why unconstitutionality should be tolerated in some cases, moves the notion of prospective over-ruling to a much stronger theoretical ground and reduces the vagueness over why newness or unpredictability is the threshold question. Its focus upon legitimate authority and introduces the notions of fundamental rights and autonomy.

If we are to embrace the doctrine of prospective over-ruling, it is imperative that we look closely at why some unconstitutionality is only prospective. The view put here is that unconstitutionality is justifiably prospective when legitimate authority has been exercised in the past or, in simpler terms, when morally justified government action has taken place. In Razian terms, the key question is whether the exercise of authority will help the individual better than they could help themselves. Obviously, if the unconstitutionality threatens to kill or imprison, the exercise of authority is much harder to justify; whereas, if it simply disadvantages a person economically, the authority may be more easily justified. The key determinant of prospective unconstitutionality, then, is whether it fits with the whole idea of having a society.

[12] See Tribe, L, *supra, n* 6, at 30-1, and Fallon, R, and Meltzer, D, *supra, n* 9.

[13] Fitzgerald B, "Ultra Vires As An Unjust Factor In The Law Of Unjust Enrichment", (1993) 2 *Griffith Law Review,* p 1.

[14] It must be noted that the High Court speaks in terms of a lack of legislative authority in establishing the invalidity of the Cheatle's convictions: *supra, n* 1, at 769 or 562 quoted above.

[15] The extent to which justice defines authority is a complex issue. It is instructive to say that if rights and/or autonomy are not respected, the exercise of authority will not be legitimate. Thus, as part of the inquiry into the justification for the exercise of authority, questions of justice will be raised. In determining the justification of authority, the Court then needs to be mindful of rights and/or autonomy and, consequently, a mature theory of substantive justice.

[16] It is conceded that judges, in practising law as interpretation, will add their interpretations of legitimacy and, thus, the legitimation process inevitably becomes one concerned with justified legislative (in the past) and judicial (the present) action.

Unconstitutionality and *Cheatle*

In *Cheatle,* the High Court did not elaborate upon the consequences of the unconstitutionality of majority verdicts. It is implicit in the wording of the judgment that the unconstitutionality of majority verdicts dates back to 1901. Can this unconstitutionality be legitimated? Are all prisoners subject to unconstitutional verdicts eligible for immediate release (subject to remand for a new trial)? Can they claim compensation?

According to the approach outlined above, the Commonwealth would need to prove the exercise of morally justified authority if it were to argue against retrospective effect being given to the unconstitutionality. The question would be whether notions of rights and/or autonomy prevent a claim that the legislature exercised morally justified authority. It would seem, in this case, that morality would suggest the individual has a right to be presumed innocent unless guilt is declared by twelve jurors in unanimous agreement. It is an essential element of our criminal justice system that guilt be proven beyond a reasonable doubt. As the judgment in *Cheatle* explains, if two jurors cannot find evidence of guilt, the seeds of doubt have been sown.[17] Furthermore, the High Court was keen to endorse the principle that a unanimous jury verdict is the result of deliberation and reflection in which the opinions of all jurors, and not just the majority are given and discussed.[18] Thus, it is suggested that prevailing political morality or community values[19] (at least in the eyes of the High Court) bestow upon the individual a right to be found guilty beyond all reasonable doubt by twelve jurors. Importantly, the Court pointed out that this right has been cherished as a fundamental value by the Australian community since at least 1901 and, therefore, the predictability of the decision made retrospective unconstitutionality acceptable.[20] In summary, since the Commonwealth legislature, has no legitimate authority (primarily due to the fundamental and long accepted right to a unanimous verdict), the argument for full retroactive unconstitutionality in the *Cheatle* case, and like cases, is persuasive. The key to determining such retroactivity is whether legitimate authority existed prior to the decision on the challenged act, and as it did not in this case (because of the right) retroactivity is acceptable.

The High Court, in remedying the Cheatles' grievance, ordered that, as the convictions were unconstitutional, they be quashed.[21] By quashing the conviction, does the High Court suggest the unconstitutional convictions stood until set aside, or is it just expunging from any records notation of a guilty verdict? For if it were only being safe and doing the latter, the unconstitutionality would seem to have effect of its own accord. If, however, the Court is suggesting it controls the temporal effect of unconstitutionality it is suggested it is mistaking the focal point of unconstitutionality; that is, government according to fundamental values.

In addition, the convictions of the people unconstitutionally convicted cannot be legitimated by retrospective legislation, as this would be inconsistent with s 80, as well as usurp the judicial power of the Commonwealth.[22]

Remaining is the burning issue of compensation if those in jail are to be released. If the legislature has gone beyond its mandate and the

[17] *Supra, n* 1, at 764 or 552-3.

[18] *Id,* at 763-4 or 552-3.

[19] On this notion, see Tushnet, M, *Red White and Blue,* (1988), Harvard UP, 145.

[20] The fact that guilt in State prosecutions in South Australia can be declared on the say of ten jurors presents an anomalous and, perhaps insupportable, legal and moral situation.

[21] *Supra, n* 1, at 769 or 562.

[22] *Polukovich v The Commonwealth* (1991) 65 ALJR 521, (1991) 172 CLR 501.

judiciary and the executive have consolidated such error through incarcerating persons, one is left with very little choice but to compensate. It is probable that the Commonwealth legislature would not have the power to prevent claims for compensation being made.[23] Such claims for compensation might be made against the Commonwealth for the tort of false imprisonment. There would seem to be no justification for the tort under statute as the tortious act of incarceration relies upon an unconstitutional statute for its justification.[24] If the incarceration is simply an indirect response to an unconstitutional statute, and a direct response to a constitutional statute, then the question of justification becomes more complex, but little more convincing. For example, if the conviction is recorded under one statute or one provision of a statute (which is unconstitutional) and the sentence and incarceration imposed under another, then it would seem the justification of the tort is dependant upon the unconstitutional statute or provision only in an indirect way, and on a valid statute or provision in a direct way. The response must be, though, that the valid statute is not legitimately activated as the jury verdict which gives it impetus is, arguably, a nullity. A further issue might be whether the order of the judge directing the executive to incarcerate the person could provide justification for the tort. A tort can only be justified if it is in some way modified by statute. The judge, in ordering incarceration, is not purporting to modify any tort and, thus, it is arguable no justification exists.[25]

Contrast the situation of someone who is found guilty by a jury acting *intra vires* the *Constitution,* but where a later inquiry proves the finding of guilt to be unsupported.[26] In this instance, a claim for compensation for the tort of false imprisonment might be met with the response that the action of the executive was justified by a valid statute.

A problem with an award of compensation comes from the way the High Court disposed of the *Cheatle Case.* In quashing the convictions, it might be said the High Court did not regard the unconstitutionality as rendering the verdicts *void ab initio* and, so, the acts of incarceration are justified. This is hard to accept and if we acknowledge that quashing is the setting-aside of a conviction *ab initio,* then the justification of the acts of incarceration seems very difficult.

An over-riding consideration in any compensation issue is the possibility of conviction pursuant to a new trial. After all, the High Court ordered a new trial in the *Cheatle Case.* Would a conviction in the second trial ameliorate the damage inflicted by the unlawful incarceration?

In summary, the position on principle must be that those previously incarcerated in breach of s 80 of the *Constitution* must be released or placed on remand pending a new trial. As for compensation, that remains a complex legal question upon which lawyers could construct arguments, either way.

Conclusion – A finding of moral authority

The view advocated by this writer is that the temporal operation of unconstitutionality is contingent upon the finding of a justification of the exercise of authority that is consistent with rights and/or autonomy. In *Cheatle,* it seems the High Court, in a blend of intentionalism and

[23] Pannam, C, "Tortious Liability For Acts Performed Under an Unconstitutional Statute", (1966) 5 *Melbourne University LR,* 113 at 125 ff. See also *Georgiadis v AOTC* (1994) 179 CLR 297.

[24] *Ibid.*

[25] Cf. the principle underlying section 252 *Criminal Code 1899 (Q)* which in this scenario prevents the executing officer from being liable for a criminal offence. Could such a principle of justification be found in the common law of civil liability?

[26] On this, see Carrington, K, Dever, M, Hogg, R, Bergen, J, and Lohrey, A, *Travesty! Miscarriages of Justice,* (1991), Academics for Justice Sydney, p.212-213; and see the limited relief provided under Part VIIC of the *Crimes Act* 1914 (Cth).

progressivism,[27] has determined that the historical conditions since 1901 have permitted the inference that *no* legitimate authority existed in the Commonwealth Government to forgo unanimous verdicts.

In other (predictable) cases, the Court might find that historical conditions permitting an inference of legitimate authority existed 20 or 10 or 5 years, months, or minutes prior to the Court's order. In *McKinney v The Queen,*[28] the High Court showed its support for prospective over-ruling in the area of criminal evidence, primarily because of the alleged unpredictability of the decision. Although this is not (yet) a constitutional issue, the prospective over-ruling approach by the High Court in *McKinney* is a clear and recent example of the Court recognising the legitimacy of the allegedly unlawful (unconstitutional?) government action (the exercise of authority) prior to the judicial decision.

Whilst admitting the possibility of legitimising unconstitutional action, it is important to level the injunction that the Court must be watchful of its use of the prospective over-ruling device, especially in constitutional law cases. The Court must be precise as to when the historical conditions or the predictability generating a case like *McKinney* arise. It is the will of the people that is paramount in deciding whether the unconstitutionality should be treated as retrospective or prospective, and it is for the Court to decipher this. If prospective over-ruling is rightfully invoked in *McKinney,* then the inference is that the community feeling on the issue was not (predictably) in accord with the decision up until the time of the judgment. Whether this was an accurate assessment is a debateable issue.

This short article gives some idea of how unconstitutionality can be better understood within the terms of the common law principle suggested by the author. The warning is sounded that, in the search for an effective solution, the High Court needs to pay more attention to the substantive nature of the unconstitutionality and that it needs to find solutions which fit the prevailing political morality of government for and by the people and in the best interests of the people.[29]

[27] On which see Craven, G, "Crisis of Constitutional Literalism in Australia" in Lee, H, and Winterton, G, (eds.), *Australian Constitutional Perspectives,* (1992), Law Book Co. Sydney, p.1.

[28] (1991) 171 CLR 468 at 476 per Mason C J and Deane Gaudron and McHugh J J, cf. Brennan J, at 486.

[29] *ACTV v Commonwealth* (1992) 66 ALJR 695 at 702-703, (1992) 177 CLR 106 at 137-7; *Nationwide News Pty Ltd v Wills* (1992) 66 ALJR 658 at 679-682, (1992) 177 CLR 1 at 70-72; Deane J in *Theophanous v Herald and Weekly Times Ltd* (1994) 124 ALR 1; Fitzgerald, B, "International Human Rights and the High Court of Australia", (1994) 1 *James Cook University Laws Review,* p 78.